IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.1269 OF 1998

Amakka Shiva Narandekar
r/o. Nej, Tal. Hatkanangale
Dist.: Kolhapur, since deceased
through L.Rs:
Shri Jaipal Tatoba Patil
r/o. Nej, Tal.: Hatkanangale
Dist.: Kolhapur ... Appellant

V/s.

Dedubhau Narandekar
since deceased, by his L.Rs
Shri Bhau Dadu Narandekar
r/o. Nej, Tal.Hatkanangale
Dist.: Kolhapur ... Respondent

Ms.K.S. Bhanage i/b S.D. Dharmadhikari for Appellant
Mr.A.A. Kumbhakoni for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **OCTOBER 12, 2004**

ORAL JUDGMENT:

. This Appeal from Order has been filed against the judgment of the Additional District Judge, Kolhapur holding that the appellant Jaipal is not the legal representative of the deceased Amakka Shiva Narandekar and dismissing the suit on that ground.

2. The deceased Amakka Shiva Narandekar had filed a suit for partition and separate possession of the 1/2 share in the suit property consisting of agricultural

land. This suit was filed on 26.7.1976. On 20.8.1979, Amakka executed a will in favour of Jaipal. On 8.2.1982, the suit was dismissed by the trial Court. An appeal was preferred by Amakka on 11.3.1982. Amakka died on 19.6.1987 during the pendency of the appeal. Jaipal filed an application before the appellate Court for being substituted in place of the deceased Amakka as appellant as he was the legal representative of the deceased. The Respondent filed his say to this application. On 28.7.1987, the appellate Court referred the will of Amakka to the trial Judge for an enquiry as to whether Jaipal was the legal representative of Amakka in order to continue in the proceedings before the appellate Court. The trial Court held on 21.10.1988 that Jaipal Tatoba Patil was not the legal representative of the deceased Amakka. Thus, the findings were returned by the trial Court to the appellate Court. The appellate Court by the impugned judgment dated 18.4.1998 held that the appeal had abated in view of the fact that Jaipal was not the legal representative of Amakka.

3. A preliminary objection has been raised by Mr.Kumbhakoni, appearing for the Respondent, regarding the maintainability of this Appeal from Order. He submits that under Order 43 Rule 1(k) of the Civil Procedure Code, an order passed under Rule 9 of Order 22

of the Civil Procedure Code refusing to set aside the abatement or dismissal of the suit is an appealable order. He submits that the impugned order only decides that the legal representative of the deceased Amakka is not Jaipal and that, therefore, the suit had abated. He submits that the impugned order is not one which has been passed under Rule 9 of Order 22 of the Civil Procedure Code and therefore, it is not appealable. According to the learned Advocate, this order has been passed under Rule 5 of Order 22 of the CPC under which the appellate Court had referred the question as to who was the legal heir of Amakka to the trial Court. After determination by the trial Court that Jaipal was not the legal heir, the Appellate Court has merely declared that Jaipal was not the legal heir and, therefore, the suit had abated. He places reliance on the judgment of the Apex Court in the case of *Mahendra Kumar v/s. Lalchand & Anr.,* **(2001) 2 SCC 619** to submit that where the determination of the question as to who is the legal representative is in process, there is no abatement of the original proceedings. It is only when the trial Court or the appellate Court determines who is the legal representative in order to prosecute the appeal that the question of abatement arises.

4. Ms.Bhanage, appearing for the appellant, submits that the order impugned has been passed under Order 22

rule 9 since it has been declared that the suit has abated. According to her, when there is such a declaration of the abatement of a suit, it is Order 22 Rule 9 of CPC which is set in operation and, therefore, the appeal is maintainable. According to the learned Advocate Order 22 Rule 5 only prescribes the procedure to be adopted in case of death of a party. She relies on the judgment of the Apex Court in the case of *Madan Naik v/s. Mst.Hansubala Devi & Ors.*, **AIR 1983 SC 676** in support of her contention. According to her, the abatement takes place on its own by passage of time and no specific order is necessary under Order 22 Rule 9 of Civil Procedure Code for setting aside the abatement. She also relies on the judgment of the Punjab & Haryana High Court in the case of *Harbans Lal and ors. v/s. Inder Chand & Ors.*, **AIR 1986 PUNJAB AND HARYANA 400** to submit that an order passed under Order 22 Rule 9 refusing to set aside the abatement or dismissing the suit as abated is an appealable under Order 43 Rule 1(k) of CPC.

5. Order 22 Rule 5 reads thus:

> . 5. Determination of question as to the legal representative - Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:
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> . Provided that where such question arises

before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

. Order 22 Rule 9 reads thus:

9. Effect of abatement or dismissal.-
(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought o the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule(2).

Explanation - Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

6. Sub-rule (2), therefore, stipulates that a person who claims to be the legal representative of the deceased plaintiff or assignee, may apply to the Court to set aside the abatement or dismissal. The Court may set aside the abatement and dismissal of he suit on such terms as it thinks fit if it is found that the party was prevented by sufficient cause from continuing with the

suit. Under Order 43 Rule 1(k), it is only if an order under Rule 9 of Order 22, refusing to set aside the abatement or dismissal of the suit is passed that an appeal is maintainable. A perusal of the impugned order indicates that there is no application made for setting aside the abatement of the suit. Instead, what has been done after Amakka expired on 19.6.1984, the appellant-Jaipal filed an application within time before the appellate Court for substituting his name as the legal representative of Amakka. He claimed his status on the basis of a will left behind by Amakka on 20.8.1979. The trial Court had referred the issue as to the validity of the will and for recording the findings as to who was the legal representative of Amakka. The trial Court had by a detailed order, held that Jaipal was not the legal representative. These findings of the trial Court arrived at on a reference made to it under Order 22 Rule 5 were accepted by the appellate Court who declared that Amakka could not be represented by Jaipal. It was also held that the appeal had abated as the appellant had died.

7. In the case before the Punjab & Haryana High Court in *Harbans Lal & Ors. v/s. Inder Chand,* **AIR 1986 PUNJAB AND HARYANA 400,** the trial Court dismissed the suit as abated as a consequence of the application for bringing the Legal Representatives on record having been

dismissed. The Appellate Court has held that for all intents and purposes the order passed by the trial Court dismissing the application of the Legal Representatives of the deceased plaintiff and the consequent dismissal of the suit was an order under Order 22 Rule 9 and therefore, an appealable order. With respect, an Appeal from Order is maintainable under Order 43 Rule 1(k) only of those orders which refuse to set aside the abatement and dismissal of the suit.

8. No application has been made for setting aside the order of abatement. Unless such an application is made, the question of Order 22 Rule 9 coming into play does not arise. On a perusal of Subrule (2) of Order 22 Rule 9 in juxtaposition with Order, an Appeal from Order is maintainable only if there is a refusal to set aside the abatement and dismissal of the suit. As there is no application for setting aside the abatement, there cannot be any refusal to do so. Therefore, the impugned order is not an appealable order under Order 43 Rule 1.

9. In view of this, the Appeal from Order is not maintainable and is dismissed as such. The appellant, however, is given liberty to take appropriate steps before the appropriate forum within 12 weeks from today for setting aside the abatement and restoring the suit.